

CITY OF EDINBURGH COUNCIL (PORTOBELLO PARK) BILL

OBJECTION 60 – PAMELA BARNES, CONVENER OF THE FRIENDS OF INVERLEITH PARK

As Convener of the Friends of Inverleith Park, I submitted an objection to the Portobello Park Private Members Bill. I have received a letter from the Clerk of your Committee, dated 25th September 2013, to say that the Bill Committee rejects our objection. You say that we would not be clearly adversely affected by the Bill but no reasons are given and I would ask you to provide us with the reasons.

The Committee of the Friends of Inverleith Park thinks that we would be clearly adversely affected as this bill could be used to justify similar legislation for Inverleith Park. The CEC has already in 2010 tried and failed to sell-off part of the park for private housing by controversially re-designating the status of part of the park in the Local Plan. We would ask you to look again at the legal opinion submitted to your Committee by Roy Mason QC. This makes it clear that this Bill, if granted would show councils all over Scotland how to appropriate inalienable common good land. I quote (my underlining):

1) From the Legal Opinion Roy Martin QC: “Precedent

16. The narrow issue is that if passed, the Bill will demonstrate a mechanism whereby local authorities can avoid their responsibilities in respect of inalienable common good land.

17. The effect of the Bill would be free the Council of those responsibilities and to deprive the community of an asset previously held by their local authority for the benefit of the community and not for the benefit of the local authority. In the future, other local authorities might use the passing of the Bill as a precedent to justify the appropriation of inalienable common good land for a whole range of purposes which they might say were in the public interest. As a result, the nature of inalienable common good land could be reduced to a status which was equal in practical terms to all of the other functions of local authorities, and legislation such as the Bill would be a practical way of making them effectively interchangeable and remove the special status which attaches to inalienable common good land.

As the Court said in the context of the argument which had been advanced on behalf of the Council that they were already entitled to transfer such common good land by virtue of the 1973 Act (the argument which the Court rejected), the outcome would be that “for practical purposes the future of every piece of inalienable common good land in Scotland, notably public parks and other open space recreational and amenity provision, would be in jeopardy.” The same would be the result if local authorities could overcome their obligations in respect of inalienable common good land by the expedient of private legislation.

2) In evidence submitted by Andrew C Ferguson, Solicitor, in response to a request from your Bill Committee it is clear that he thinks situations like Portobello will be frequent and not ‘unique’ as claimed by the CEC in their submission. He states (my underlining):

“9.1 However, I do think that the issue confronted by the City of Edinburgh Council in Portobello is one which has even more general application.

9.4 I do therefore think that the circumstances which led up to the bill, and the issue confronted by the City of Edinburgh Council, is likely to be a relatively frequent issue in some part of Scotland over the coming decades. It is also fair to say that new school buildings on what was previously open space is often likely to be controversial and divisive.”

3) In evidence submitted by Roderick J McGeogh, Solicitor, in response to a request from your Bill Committee he states (my underlining):

“C.2 The characteristic of inalienability is effectively a legal recognition of an underlying right of the inhabitants of the former burghs to have and use certain properties for their established purposes. Such rights may be either expressly created in the original conveyances by which the burghs or town councils took title, or constituted either by irrevocable dedication to public uses by the town council

D. Statutory powers of appropriation/disposal of common good land

D.3 Section 75(2) meaning that there is no mechanism whereby local authorities can transfer inalienable common good properties to other council departments.

D.4 It is not entirely clear as to why Parliament had decided that that should be the case, although one might speculate as to a number of possible reasons. Certainly, it is not difficult to imagine the potential for conflicts of interests which could otherwise arise. There is perhaps something innately inappropriate in the notion that a local authority which is acting as custodian might, at the same time, take steps (perhaps for its own convenience) which would deny the residents of one of its towns the use of the very facility which it is supposed to be administering on their behalf. The basic legal principle is, after all, that these inalienable common good lands and buildings are properties which ought normally to be retained so that the people entitled to use and enjoy them will be able to continue to use and enjoy them.

D.6 However, it is perhaps equally easy to imagine that if there was an express ability on the part of the councils to appropriate inalienable common good land (albeit subject to the court’s approval), then that in itself would increase the likelihood of more pressure being exerted for changes in the uses of (and thus increase the potential for the loss of) many of Scotland’s remaining public open spaces.

H.1 If the land at Portobello Park is currently inalienable common good, it is clear that the Bill as presented does not offer the same judicial safeguards for the residents of the city as those which would have been available had the Council’s intention been to effect a disposal to a third party as opposed to an appropriation for another of its own functions...”

All three legal opinions quoted above suggest that the likelihood of local authorities using mechanisms such as this Bill will be increased with consequent loss of Scotland's remaining public spaces. These legal opinions suggest that we are correct to think that Inverleith Park is at risk and therefore our interest is indeed clearly adversely affected if the Bill is passed, especially as in 2010 the CEC attempted and failed to sell-off part of the park – something which they would clearly like to do. If this Bill is passed it would indicate a further mechanism that could be used in the future to appropriate the inalienable common good land of Inverleith Park.

Indeed, Andrew Burns and Sue Bruce, Leader and Chief Executive of the CEC (in their own letter of the 9 October 2012 to Scottish Ministers released under Freedom of Information) indicate that there will be other 'projects' (my underlining):

"we would wish to explore whether there is Ministerial support for legislative change that will enable our project, and others of similar value, to be taken forward."

Andrew Burns and Sue Bruce indicate also that there will be impact on other areas in Scotland. The following quotes from their letter show this (my underlining):

"Whilst this request is being made on behalf of the City of Edinburgh Council, we are sure that this matter will be of interest to other local authorities"

"This restriction.... will potentially have a significant impact elsewhere in Scotland."

"We understand that other local authorities have, in the absence of legal challenge, already appropriated inalienable common good for educational purposes. It can also be expected that local authorities will be keen to utilise their existing estates for future projects, but that the state of the law following the Court of Session judgement may frustrate their plans

The Intention of the Scottish and Westminster Parliaments (in the letter from Andrew Burns and Sue Bruce, CEC)

In their letter to Scottish Ministers the CEC argues that it was not the intention of the Scottish or Westminster Parliament to restrict local authorities from appropriating inalienable common good land and that as the law already allows local authorities to dispose of such land then the intention of both parliaments was that they should also be able to appropriate such land. They state in the Appendix (my underlining):

"Section 75(1) of the Local Government (Scotland) Act 1973 permits local authorities to appropriate or dispose of alienable common good land. Section 75(2) of the 1973 Act permits local authorities to dispose of inalienable common good subjects, subject to obtaining the prior authority of the courts. However, the 1973 Act contains no specific reference to the appropriation by local authorities of inalienable common good land. It is the Council's view that the absence of such a specific power of appropriation is simply a legislative oversight"

The power of appropriation for alienable common good land is unconstrained [Section 75(1)]. Legislation concerning the appropriation of inalienable common good

land [Section 75(2)] may, or may not, have been badly drafted or a '*legislative oversight*' as suggested by CEC. Even assuming it was, there is no reason to think that the legislators would not have added '*subject to obtaining the prior authority of the courts*' to any appropriation of inalienable common good land and there is no knowing what the courts might say if asked to allow councils to give up one public good i.e. a park for another i.e. a school - especially when there are other options available for that school.

The CEC's letter quoted above (which you may not have seen) makes it clear that Edinburgh Council itself clearly sees the potential of the Private Members Bill for its own future projects as well as those of other local authorities. I would ask you to consider again the 7 objections that you have rejected and re-instate them as being relevant to the **principles** behind this Private Members Bill as they are all concerned with the possibility of similar appropriation of inalienable common good land elsewhere in Scotland which would clearly adversely affect them. In our case, if any part of our park were to be appropriated it would clearly affect the amenity and well being of the local community. We would also lose the use of this area of Portobello Park and of other areas of Scotland where inalienable common good parkland has been appropriated.

One further point which needs to be clarified is how you are defining the local community that you do consider to be '*clearly adversely affected*'. In 1898, Portobello Park was acquired by the Lord Provost, Magistrates and Council of the City of Edinburgh. It contained the following condition (my underlining):

"That the area or piece of ground hereby disposed shall be used exclusively as a Public Park and Recreation Ground for behalf of the Community of said City"

Here the 'Community' is the City of Edinburgh. Furthermore the CEC consultation accepted opinions from people across Edinburgh even if it did not advertise the consultation widely. What geographical boundaries are you setting to determine the area which is relevant to the phrase '*clearly adversely affected*'? All members of the community of Edinburgh will lose the amenity of this park if the land is appropriated by the council for another purpose.

The Portobello Private Bill Committee appears to have decided in private that the Bill will not have an impact on anyone in Scotland outside Portobello. Surely this important matter is not something that should be decided in private session thus blocking proper public debate and transparency. If the Committee Members are confident that the Bill will have no impact elsewhere in Scotland, outside of the immediate area of the Portobello Park, then they should be able to debate this opinion in public with confidence. However eminent legal opinion as demonstrated above does not support this position.

If you have concern for the reputation of the Scottish Parliament you will allow the more general arguments on the principles of the Bill that have been made in the rejected objections to the Bill to be put forward to the MSPs of the Scottish Parliament. I ask you to reconsider and reinstate the 7 objections that you have rejected.

I look forward to hearing from you.

4 October 2013

Copies to: Marco Biagi MSP, Sarah Boyack MSP, Inverleith Local Councillors.

John Swinney MSP
Cabinet Secretary for Finance, Employment
and Sustainable Growth
The Scottish Government
Victoria Quay Edinburgh EH6 6QQ

Our Ref: AB/SB
Your Ref:
Date: 9 October 2012

Dear Mr Swinney

New Portobello High School

As you may already be aware, plans by the City of Edinburgh Council to build a new Portobello High School on part of Portobello Park have recently encountered a major setback in the form of a decision of the Court of Session last month.

Our purpose in writing is to seek your assistance in ensuring that the new school is delivered on the preferred site on Portobello Park at the earliest opportunity.

As there are clearly a number of Ministerial interests involved in this particular matter we have taken the liberty of sending this letter to the Cabinet Secretary for Education and Lifelong Learning, the Cabinet Secretary for Justice and the Cabinet Secretary for Finance, Employment and Sustainable Growth.

Background

The existing Portobello High School is, and has been for many years, in urgent need of replacement. This need is well illustrated by the storm damage the school suffered only very recently which resulted in it having to be closed for the day.

During 2006 an extensive and exhaustive assessment was undertaken of any potential sites in, and around, the school catchment area for a new school. Three potential options were short-listed and taken forward as the subject of a full education statutory consultation, at the conclusion of which, in December 2006, the Council approved Portobello Park as the location for the new Portobello High School. We did not feel that it was necessary for this letter to detail all of the key events in the history of the project, but in Appendix 1 we have included a timeline should this be of interest.

We would emphasise, that the Council believes the good reasons why Portobello Park was approved as the location for the new school are still as valid as ever, and we have a "shovel-ready" project, with funding secured and all necessary statutory consents in place. We have also selected a preferred contractor who offers high quality at a very competitive price.

The Council believes that building the new school on part of Portobello Park has a substantial body of support amongst the local community, despite the well publicised opposition of some, and is the community's preferred option. However, the recent Court judgment prevents further progress.

Legal Challenge

In essence, the Court has decided that although local authorities have powers to dispose of inalienable common good land, they do not have the power to appropriate such land for an alternative statutory purpose, whether under the provisions of the Local Government (Scotland) Act 1973, the Local Government in Scotland Act 2003 or otherwise. This position would appear to apply to any proposed alternative purpose, regardless of its merits. The judgment has also recast the power to advance well-being as a limited ancillary power, which of course has wider implications for all Scottish local authorities. This limitation does not accord with what the Council understands to have been the intention of the Scottish Parliament, which is that the power ought to be available as one of first instance

We do not believe that this position was ever the intention of Westminster or of the Scottish Parliament. It has, however, come about as a consequence of a challenge by a local action group that is not, in our view, reflective of the wider community interest.

We understand that other local authorities have, in the absence of legal challenge, already appropriated inalienable common good for educational purposes. It can also be expected that local authorities will be keen to utilise their existing estates for future projects, but that the state of the law following the Court of Session judgement may frustrate their plans – even where it can be argued, as in the case of Portobello Park, that their plans will bring significant benefits to local communities.

In case it assists, in Appendix 2 we have included a slightly more detailed summary of the legal issues considered by the Court.

Next steps

On 25 October the Council will consider a report which will set out a number of options as to how the present legal impediment might be overcome. The report will also consider alternative sites, although it is safe to say that the Portobello Park site continues to be the preferred option and any alternative which might be available would represent a significant compromise by comparison

Preliminary investigations suggest that the difficulties associated with the other alternatives which were previously identified and discounted have not been overcome and, in some cases, have been further exacerbated.

Legal Options

In conjunction with our legal advisers we have undertaken a thorough assessment of the legal options now available to the Council. There are, however, a number of practical considerations that drive the need for an effective solution within a reasonable period of time, including that the planning permission for the school will expire in February 2014. Additionally, the Council is mindful of the cost to the public purse of pursuing the options that are open to it. For these reasons we would wish to explore whether there is Ministerial support for legislative change that will enable our project, and others of similar value, to be taken forward.

The Council is obviously aware of the current consultation on the proposed Community Empowerment and Renewal Bill which has, within the wide range of matters covered, recognised the necessity to review areas of uncertainty on common good such as that which we have experienced. However even if, following consultation, the Scottish Government does decide to proceed with the Bill the likely timescales are such that it would be a considerable period of time before any legislation which might clarify the existing situation was enacted and this obviously presumes that any legislation would allow our particular issue to be resolved.

As such, there are three options which we believe are available which would, in the majority of instances, involve legislative change to the Local Government (Scotland) Act 1973 and/or the Local Government in Scotland Act 2003, but would all require the support of both Ministers and the Scottish Parliament to varying degrees, these being as follows:

1. A Private Act of the Scottish Parliament under the provisions of section 82 of the Local Government (Scotland) Act 1973;
2. An Executive Bill of the Scottish Parliament; or
3. An order made by Scottish Ministers under the provisions of section 57 of the Local Government in Scotland Act 2003.

These approaches entail significantly different requirements and timing. Obviously the extent to which Ministers and/or Parliament would be persuaded that the circumstances are of sufficient significance that they would merit action under any of the above provisions cannot, and is not, being presumed.

However, we do believe that there are unique and extenuating circumstances on this occasion regarding which we would, respectfully, welcome your thoughts regarding the extent to which you may be minded to assist.

Whilst this request is being made on behalf of the City of Edinburgh Council, we are sure that this matter will be of interest to other local authorities, albeit the opportunity has not yet been taken to raise the matter more widely through COSLA.

We need an urgent solution to the entirely unexpected situation which we now find ourselves in, of having evidently no current lawful means by which we might appropriate inalienable common good land for what we consider to be the real benefit and well-being of the community of Portobello. This restriction, and the limited scope for the exercise of the power to advance well-being by Scottish local authorities, will potentially have a significant impact elsewhere in Scotland.

In this regard, we would welcome your thoughts and what assistance, if any, you consider might be possible in resolving this matter. Should you require any further information, or wish to discuss this matter in more detail, please let us know. A more detailed briefing on the matters raised in this letter can also be arranged.

Yours sincerely

SUE BRUCE
Chief Executive

ANDREW BURNS
Leader of City of Edinburgh Council

cc: Michael Russell, Cabinet Secretary for Education and Lifelong Learning
Kenny MacAskill, Cabinet Secretary for Justice

Appendix 1

Historic Timeline

December 2006 – The Council approved Portobello Park as the location for the new school, following full statutory consultation.

December 2008 – The Council approved the new school as the first priority within its Wave 3 school replacement programme.

February 2009 – Funding for the project confirmed in the Council's Capital Investment Programme.

March 2010 – The Council approved the revised approach to open space compensation.

October 2010 – The Council lodged a planning application for the new school.

February 2011 – The Council was granted full planning permission for the school.

July 2011 – PPAG lodged petition with Court of Session to judicially review the Council's decision to build the school on part of the Park.

September 2011 – Council selected Balfour Beatty as preferred contractor for the school.

January/February 2012 – Judicial Review action heard in Outer House of Court of Session.

March 2012 – Judgement issued by Outer House, rejecting the legal challenge of PPAG.

April 2012 – Council approved the appropriation of part of Portobello Park for the new school (under both the 1973 Act and the 2003 Act) and made a decision to formally appoint Balfour Beatty upon PPAG's legal challenge being resolved.

May 2012 – PPAG's appeal heard in the Inner House of the Court of Session.

September 2012 – Judgement issued by Inner House overturning the Outer House's decision and upholding PPAG's legal challenge.

Appendix 2

Brief Summary of Legal Issue

Portobello Park was acquired by the statutory predecessors of the Council in 1898. The Council never considered it to be part of the common good of the City however this changed in 2006 when PPAG obtained a QC's legal opinion suggesting it was. The Council then conducted its own research into the issue, and concluded that facts and circumstances indicated it was inalienable common good.

Section 75(1) of the Local Government (Scotland) Act 1973 permits local authorities to appropriate or dispose of alienable common good land. Section 75(2) of the 1973 Act permits local authorities to dispose of inalienable common good subjects, subject to obtaining the prior authority of the courts. However, the 1973 Act contains no specific reference to the appropriation by local authorities of inalienable common good land. It is the Council's view that the absence of such a specific power of appropriation is simply a legislative oversight, and that local authorities can still lawfully take such action. This view was confirmed by a joint opinion from two QCs which the Council obtained in November 2008.

Given this legal position, the Council considered that it did not require the approval of the Court to the proposed appropriation, and that it was able to proceed without it.

There is precedent for this assertion e.g. in the case of North Lanarkshire Council which, in 2005, took a petition to the Outer House of the Court of Session for approval of what they considered to be the disposal of inalienable common good land. The intended disposal related to the proposed construction of a school on land under a public private partnership and subject to a lease and lease-back arrangement. The Court determined that this was not actually a disposal as the use of the land for a school did not deprive the local community of the benefit of the land. The petition was dismissed as being unnecessary and the school subsequently built. If this was not a disposal it was appropriation.

In 2011 PPAG sought judicial review of the Council's actions. When PPAG's action was heard by the Outer House of the Court of Session in January 2012 the court agreed with the Council. However, PPAG then appealed to the Inner House, who heard the case in May 2012, its decision being issued in September 2012.

The Inner House ruled that local authorities do not have the power to appropriate inalienable common good land under the 1973 Act, and also ruled that local authorities do not have the power to appropriate such land under the Local Government in Scotland Act 2003. This outcome was both extremely disappointing and unexpected.

The Inner House's rejection of the Council's decision to appropriate such land under the provisions of Section 20(1) of the Local Government in Scotland Act 2003 is, in the Council's opinion, very surprising. In particular, the very narrow definition which the Court has applied seems to be at odds with what it had been understood the intent of this legislation was, and the powers which it confers on local authorities. The well-being power is widely drawn and it is clear from the applicable statutory

guidance issued by the Scottish Ministers that it is intended to be a power of first resort, in other words it is to be relied upon to enable local authorities to fulfil their statutory duties.

It is respectfully considered that the Inner House's decision has overly restricted the ability of local authorities to deal with their common good assets, and how they might use the power to advance well-being under the 2003 Act. These restrictions are likely to be a concern for all local authorities in Scotland, not only the Council and the replacement of Portobello High School.